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Supreme Court of the United States

OCTOBER TERM, 1946.

No. 971

FRANK LOTTO and
JOSEPH RAYMOND CULLOTTA,
Petitioners,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Walter F. Maley,
Frank J. Comfort,
Counsel for Petitioners.

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FRANK LOTTO and
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Frank Lotto and Joseph Raymond Cullotta, residents and citizens of the State of Illinois, respectfully petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review its decision and judgment rendered on the 22nd day of October, 1946, rehearing denied, December 4, 1946, (R. 320 and 349) officially reported in 157 F. (2d) 623.

A.
SUMMARY STATEMENT OF THE MATTER INVOLVED.

The indictment involved is found (R. 1 to 11). Appellants, Frank Lotto and Joseph Raymond Cullotta, were jointly charged in an indictment containing ten counts. Counts I-VII inclusive charged them with unlawful possession of certain gasoline ration coupons which they had acquired by theft from named persons in Wisconsin, Minnesota, and Iowa, in violation of Sec. 1394.-8177 (c) of Revised Ration Order 5 (c) (10 Fed. Register 4893) and General Ration Order 8, as amended (8. Fed. Register 3783), issued under authority of the Second War Powers Act, 50 U.S.C.A. Appendix, Sec. 633. Counts VIII-X inclusive charged the theft of the coupons involved in counts V-VII inclusive, in violation of 18 U.S.C.A. Sec. 99. It was charged that the coupons were the property of the United States Government and that the persons from whom they were stolen were in temporary lawful possession thereof. Before the trial defendants moved to consolidate the first seven counts, or, in the alternative, to require the government to elect on which of the counts to proceed to trial. The motion was overruled, but at the close of the evidence the seven counts were consolidated. Defendants were convicted on the consolidated counts and on each of the three counts charging larceny of government property. Defendant Lotto was sentenced to one year for unlawful possession of ration coupons and to five years on each of the larceny counts, and Cullotta was sentenced to one year for unlawful possession and seven years on each larceny count, the sentences on all counts as to each defendant to run concurrently.

On May 25, 1945, the police of Mason City, Iowa, received a broadcast over the state police radio system to be on the lookout for a maroon Plymouth or Dodge automobile, bearing Illinois license plates and carrying two men who were

suspected of stealing gasoline ration coupons. At about 2:45 P. M. Officer Charles Van Horn of the Mason City Police force observed an automobile answering the description that had been broadcast, pursued it and forced it to stop. After questioning defendants, who were in the car, Van Horn radioed the police station that he had stopped defendants and proceeded to give the automobile a casual search. Two Iowa State Highway patrolmen came in response to Van Horn's call, a further search was made and the state police found the coupons under the floor mat of the automobile. The coupons were seized and subsequently were turned over to federal authorities. The search was made without the issuance of a warrant, either state or federal.

Ration Order No. 5C. Section 1394.-8235 (b) provided in part:

> "Upon demand made by any investigator of the Office of Price Administration or by any police officer, constable, or other law enforcement officer of the United States or of any state, county, or local government, every person shall produce for inspection any tire inspection record and gasoline deposit certificate and any gasoline coupon books, coupons, and other evidences in his possession or control, whether valid, invalid, void or expired in accordance with Ration Order No. 5C. Investigators of the Office of Price Administration and all police officers, constables and other law enforcement officers of the United States, or of any state, county or local government are authorized to make such inquiries of any person as may be pertinent to determine whether a violation of Ration Order No. 5C has been or is being committed, and are authorized to receive the surrender of all gasoline deposit certificates, gasoline coupon books, coupons and other evidences acquired by any person otherwise then in accordance with Ration Order No. 5C, whether valid, invalid, void or expired."

Appellants timely moved to suppress the evidence arising out of the seizure. (R. 13.) Their Motion seasonably made

before trial was overruled. (R. 13.) Petitioners asserted that the automobile was improperly searched and the coupons seized by the state officers; that the officers made the search and seizure for the sole purpose of enforcing Federal laws and were acting in cooperation with or at the invitation or instigation of agents or officers of the United States, and in an effort to assist in enforcement of O.P.A. regulations, including Ration Order 5C. (Supra) and that the search and seizure in question was unlawful because not made under any pretense of enforcing State law, but solely in behalf of the United States for the intended purpose of criminal prosecution. The arresting police officers did not know Petitioners or see them engaged in the violation of any law, and after arresting petitioners, placed them in the City Jail and held them without filing any charges. Two or three days later an officer or Agent of the O.P.A. came to Mason City and was fully advised of the arrest of petitioners and the evidence obtained. Prosecution thereafter followed by indictment in the United States District Court of Northern Iowa. No complaint was filed or prosecution had in the police Court or the State Courts of Iowa. Police officers were not undertaking to enforce any law of the City or State, but solely to aid in the enforcement of Federal law.

It may be assumed, although it was not proven, that the gasoline coupons in question were originally issued under proper regulation and by those authorized; that when used by those to whom they had been issued, the license number of the car receiving the gasoline was written on the face of the coupon and delivered to the gasoline station dealer. It was established that the retail gasoline dealer stuck these used stamps on gummed sheets and gave them to bulk gasoline dealers or drivers at the time delivery of gasoline was made to the retail dealers. The evidence showed the larceny of these used and disfigured coupons from the trucks of various

bulk gasoline wholesale dealers or drivers in Wisconsin, Minnesota and Iowa. What disposition is or was to be made thereafter of these used gasoline ration coupons does not appear. After used, it seems clear they were to be deposited in banks and destroyed. Petitioners contend that neither the crime of unlawful possession or larceny of the same had been committed under the record made for these reasons and that under the facts there was no violation of Sec. 1394.8177 of Revised Ration Order 5C, and General Ration Order No. 8, as amended, in that said order, by its terms, did not prohibit possession of used, disfigured and cancelled stamps, nor was it intended to apply to the possession of gasoline coupons so used, delivered or possessed. (R. 246.)

It was also contended by Petitioners that the said Ration Orders upon which the charge in the indictment was based, were so generally vague, indefinite and uncertain, they failed to furnish ascertainable standards of guilt and hence are void and unconstitutional. (R. 245.) The Motion to Suppress the testimony was renewed at the close of the government's evidence. (R. 243.)

Petitioner moved for an Instructed Verdict. (R. 244.) The Motion was overruled. (R. 247.) Motion for Instructed Verdict was renewed and overruled at the close of all of the evidence. (R. 311.)

Petitioners urged that the evidence was insufficient to support the verdict that they feloniously carried away gasoline ration coupons belonging to the United States of America; that the ration coupons in question were not the subject of larceny; that ownership of the coupons in the government was not proven as laid; that there was no evidence proving or tending to prove, the official source, custody, control, issuance, or possession of said stamps or coupons by the United States of America, or any evidence as to where, when or how the individuals named, in Counts 8, 9 and 10, came into pos-

session of the stamps and no evidence that the same were at any time, the property of the United States.

Petitioners contend that in Instruction No. 7, the Court invaded the province of the jury and assumed as an established fact, a matter vitally in dispute wherein the Court instructed the jury that: "During the month of May, 1945, gasoline ration coupons were personal property belonging to the United States Government". (R. 18.)

By Instructions 11, 12, 13, 14, 15, 16, 17, 18 and 19, the jury were permitted to convict petitioners without any finding or determination on their part, that the stamps or coupons involved were the property of the United States.

B.

JURISDICTIONAL STATEMENT.

1. The jurisdiction of the Court is invoked under Section 237 (b) of the Judicial Code, as amended: 28 U.S.C., Section 344 (b). The judgment of the Eighth Circuit Court of Appeals to be reviewed was entered on October 22, 1946. (R. 320), and rehearing denied, December 4, 1946. (R. 349.) The time for filing petition in this Court was extended to February 1, 1947. The jurisdiction of this Court is sustained by the following cases: **Byers vs. United States,** 273 U.S. Pg. 28; **Gambino vs. United States,** 275 U.S. 310; **Davis vs. United States,** (dec. June 10, 1946) 66 S. Ct. 1256; **Gouled vs. United States,** 255 U.S. 298; **Weeks vs. United States,** 232 U.S. 383; **Bihn vs. United States** (dec. June 10, 1946); **Kraus Brothers vs. United States** (dec. Mar. 25, 1946); **Bollenback vs. United States** (dec. Jan. 28, 1946); **Wiborg vs. United States,** 163 U.S. 632; **Clyatt vs. United States,** 197 U.S. 207.

C.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

(a) The trial of Petitioners was so conducted as to deprive them of due process of law in violation of the Four-

teenth Amendment to the Constitution of the United States. **Davis vs. United States, 66 S. Ct. 1256; Gambino vs. U. S., 275 U.S. 310; Byers vs. U. S., 273 U.S. Pg. 28.**

(b) The search and seizure as conducted, where there is a general understanding between State and Federal officers, and a common practice that the latter may adopt and prosecute in the Federal Courts, offenses which the former discover in the course of their operations and a prosecution so originated including search and seizure is adopted by government officers, the evidence obtained as a result of the search and seizure is to be suppressed in the same manner as though the search and seizure had been made by Federal officers.

(c) Where State officers obtain evidence through means of an unlawful search and seizure not made under any pretense of enforcing State law, but solely in behalf of the United States, for the intended purpose of criminal prosecution, it is open to suppression by appropriate proceeding timely taken. **Gambino vs. United States, 275 U.S. 310; Nardone vs. U. S., 308 U.S. 338.**

(d) The Ration Orders themselves and the allegations in each Count of the indictment were so vague, indefinite and uncertain that they failed to furnish ascertainable standards of guilt and hence are void and unconstitutional.

(e) It was error on the part of the Court to overrule the Motion for Instructed Verdict made at the close of the government's evidence and thereafter renewed at the close of all of the evidence, with particular reference to Counts 8, 9 and 10, charging the larceny of Government property, because it was not proven that the Ration coupons described were government property within the purview of Section 99, Title 18, U.S.C.A., and because the application of Section 99, Title 18, to the facts as described of record was an unlawful application thereof and violative of the rights guaranteed

Petitioners under the Fourteenth Amendment.

(f) The Court erred in giving Instruction No. 7, for that it invaded the province of the jury on a matter vitally in dispute wherein the Court instructed that the ration coupons were personal property belonging to the United States and thereafter, repeating the same error in Instructions No. 11 to 19 inclusive, in permitting the Petitioners to be convicted without any finding or determination that the stamps or coupons involved were the property of the United States.

(g) For error committed in overruling Petitioners' Motions for Instructed Verdict.

D.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. Section 1394.8235 (b), of the rationing regulations provides in brief, that any and all law enforcing officers of the United States or of any State, County or local government, are authorized to make demand upon any person for the production of gasoline coupons whether valid, or invalid, void or expired in accordance with Ration Order No. 5C, alleged in each Count of the indictment and further, authorized inquiries, by them, of any persons, and to accept or take over said coupons. This authorization and direction by the Government brought the instant case within the rule laid down in **Gambino vs. United States,** 275 U.S. 310.

2. The **Davis** case relied on by the Government, 66 S. Ct. 1159, was not controlling because the search and seizure therein justified, turned on the question of consent. As applied to the instant case, it was error for the Court to justify the search and seizure by State officers, in view of the O.P.A. regulations referred to and permit Federal officers to adopt and prosecute in Federal Courts, offenses which State officers discover in the course of such operations and not made under any pretense of enforcing State law, but solely in behalf of

the United States for the intended purpose of criminal prosecution in Federal Courts. **Gambino vs. United States,** 275 U.S. 310; **Olmstead vs. U. S.,** 277 U.S. 438; **United States vs. Lefkowitz,** 285 U.S. 452; **Go-Bart Importing Co. vs. U. S.,** 282 U.S. 344.

3. Appellants contend that the Ration Orders in question as applied to the facts in this case, where the stamps had been used and served their purpose and there was no evidence of possession or desire to possess the same thereafter on the part of the government, and the indictment as a whole and each and every Count thereof predicated upon said ration orders, were so vague, indefinite and uncertain that they failed to furnish ascertainable standards of guilt and the regulations were void and unconstitutional and the indictment as a whole, and each and every Count thereof, so indefinite and uncertain as to be void. **M. Kraus & Brothers vs. U. S. of America,** (dec. Mar. 25, 1946, by the Supreme Court of U.S.).

4. Where the gasoline coupons involved had been used, cancelled and disfigured, and there was no evidence that these cancelled stamps had ever been issued by, or were, the property of the United States, the evidence was not sufficient to sustain the conviction of Petitioners and it was error to overrule their Motion for Instructed Verdicts. **Norton vs. Zerbst,** (CCA 10) 83 F. (2d) 677, Cert. den. 299 U.S. 541; **Cartwright vs. U. S.,** (CCA 5) 142 F. (2d) 133; **Patmore vs. U. S.,** (CCA 6) 1 Fed. (2d) Pg. 8; **Donegan vs. U. S.,** (CCA 2) 287 F. 641; **Loney vs. U. S.,** (CCA 10) 141 F. (2d) Pg. 1; **Conture vs. U. S.,** (CCA 8) 256 Fed. 525.

The Petitioners were deprived of their liberty without due process of law in contravention of the Fourth and Fifth Amendments to the Constitution of the United States and to Section 1, of the Fourteenth Amendment, by erroneous submission to the jury of Instruction 7, and Instructions 14

to 19 inclusive, for that after stating in Instruction No. 7, that gasoline ration coupons were the personal property of the United States, the Court relieved the jury of any finding in Instructions 14 to 19 inclusive, that the gasoline ration coupons involved in the indictment, were the property of the United States. That element was essential, definite and vital in the establishment of the crime. It was so created by statute and recognized in the indictment and by the Court in Instruction 1, but thereafter abandoned in the remainder of the Instructions. **Bihn vs. U. S.**, 90 L. Ed. 1208, (dec. Jan. 10, 1946); **Kraus vs. U. S.**, 90 L. Ed. 653, (dec. Mar. 25, 1946); **Bollenbach vs. U. S.**, 90 L. Ed. 318, (dec. Jan. 28, 1946); **U. S. vs. Cook**, 17 Wall. 168; **Smith vs. U. S.**, 157 F. (2d) 176; **Screws vs. U. S.**, 90 L. Ed. 1029.

6. The judgment of the United States District Court and the Eighth Circuit Court of Appeals is not in accord with the decisions of this Court in **Gambino vs. U. S.**, 275 U.S. 310; **Byers vs. U. S.**, 273 U.S. Pg. 28; **Davis vs. U. S.**, 66 S. Ct. 1256; **Screws vs. U. S.**, 90 L. Ed. 1029; **Bihn vs. U. S.**, (dec. June 10, 1946); **Kraus Brothers vs. U. S.**, (dec. Mar. 25, 1956); **Bollenback vs. U. S.**, (dec. Jan. 28, 1946); **United States vs. Cook**, 17 Wall 168.

WHEREFORE, your Petitioners respectfully pray that a Writ of Certiorari be issued under the seal of this Court directed to the United States Circuit Court of Appeals for the Eighth Circuit to the end that this cause may be reviewed and determined by this Court; and that the judgment of the United States Circuit Court of Appeals, Eighth Circuit, be reversed by this Court, and for such other and further relief as to this Court may seem proper.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1946.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

ARGUMENT.

I.

The Government cannot rely on a conviction based on evidence obtained illegally and in violation of the rights of the citizen under Section 8 of Article I of the Constitution of Iowa and of the 4th and 5th Amendments to the Constitution of the United States. This is true where a search and seizure is set in motion by complaint to Federal officers, although not

participated in by them, but the fruits of which could not be used in any other court than one of the United States and such prosecution follows, because by so doing the citizen is illegally deprived of the protection afforded him under the 4th Amendment of the Federal Constitution where a motion to suppress is timely and properly interposed. **Section 8, Article I, Constitution of Iowa; Amendments 4 and 5, Constitution of the United States; Byers vs. U. S.**, 273 U.S. 28; **Gambino vs. U. S.**, 275 U.S. 310; **Davis vs. U. S.**, 90 L. Ed. 1156, (decided June 10, 1946).

Seasonably and before trial petitioners moved to suppress all evidence concerning or arising out of the seizure of the gasoline ration coupins (R. 13). They alleged that the coupons were not seized under and by virtue of the authority of a search warrant and that the introduction of such evidence in view of that fact was violative of their constitutional rights as provided in the 4th and 5th Amendments to the Constitution of the United States. (R. 50 to 70.) A police officer, Van Horn in Mason City, Iowa, had been instructed to be on watch for a maroon colored car with an Illinois license. (R. 51.) About 2:45 in the afternoon he saw such a car going east out of Mason City, pursued it and forced them to stop. Petitioners were in the car. Van Horn radioed the Chief of Police that he had stopped a maroon colored Dodge car with two men in it. He looked into the car because "these men were suspicioned of stealing gas coupons". (R. 54.) He had no search warrant, State or Federal. Two patrolmen, Hilbert and Krieger, came in response to his radio call. Petitioners were handcuffed and a search then made of the car resulting in the discovery of a brown paper sack containing used and disfigured gasoline coupons. Petitioners were arrested and kept in the city jail at Mason City, but no charges filed. Two days later a Federal officer showed up and prosecution followed in the United States District Court for Northern Iowa. The motion to suppress was overruled.

Petitioners contend that where evidence is seized by State officers which is Government property and available only to Federal authorities as a basis for Federal prosecution and the evidence is surrendered to such Federal officers and used by them for prosecution and conviction in the Federal courts, the evidence should not be admissible or received against them when challenged promptly. That motion to suppress seasonably urged should be granted unless it affirmatively appears by the Federal officers who initiate the Federal prosecution that they did not initiate, encourage, act in concert with or have knowledge of the search and seizure so conducted by State officers. We believe this to be a reasonable and practical rule in view of the facility with which Federal officers can and do enlist the efforts and facilities of State officers in making raids, searches and seizure without a search warrant in violation of both the State and Federal Constitutions. Both the State of Iowa under Section 8, Article I, and the Government under the 4th and 5th Amendments prohibit searches except upon search warrants issued upon probable cause. Since the decision in the Byers and Gambino cases there has been a recognized development of this rule.

Thus in **U. S. vs. Duiguid,** (2d Cir.) 146 Fed. 2d 848, New York police officers without a search warrant entered appellant's home and found a still in operation. One of them telephoned a Federal Agent who went to the premises and received the contraband items seized by the police officers. The Second Circuit said:

> "The court found uncontradicted evidence that the federal agents did not act in concert with the police officers and that the federal officers knew nothing about the raid until it had been made. This is enough to establish those facts."

However, a witness in Fort Atkinson, Wisconsin, when asked what he did after he discovered the loss of the gasoline coupons out of his truck answered: "Well, I notified the Ration Board and also the Police Department that these

coupons were missing." (R. 85.) Another witness (R. 119) testified on page 124 that as soon as he discovered the loss of his coupons he notified a policeman in the Town of Austin, Minnesota. The fair assumption and conclusion from this character of evidence could only be that these people who lost their gasoline ration coupons reported it to the police and their local Ration Boards and that since the gasoline coupons seized were supervised and controlled by the Federal Government, that the Ration Boards and their agents solicited the help of State officers in Wisconsin, Minnesota and Iowa. That in response to this appeal for help the State officers in Iowa caused a state broadcast to be sent out asking that a Dodge maroon colored car with an Illinois license and being driven by two men be arrested and search and seizure made. Moreover, it does not appear that officers of O.P.A. have any authorization to make arrests and under the circumstances it is clear that the State officers in Iowa had no power to make an arrest because no crime had been committed in their presence, nor any crime committed of which they had reasonable grounds to believe petitioners guilty—certainly no law by which Iowa officers are authorized or under duty to make arrest for Federal offenses. **Gambino vs. U. S.,** (2d Cir. 29 Fed. 2d 172. See generally **U. S. vs. Davis,** 151 Fed. 2d 140, decided June 10, 1946, with dissenting opinions. In the Davis case the constitutional challenge to the search was met and overcome by an express finding of waiver and consent. Petitioners were not gasoline dealers, they were private citizens and immune from the search made upon any legal basis. It is not justified by either Iowa law or Federal law unless it is to be now interpreted as meaning that police officers of the State possess a legal advantage to search and seize without warrant and invite courts to retrospectively hold that their searches and seizures were reasonable on the naked theory that relevant evidence was obtained. Such a thought was expressly repudiated in **Gouled** vs. **United States,** 255 U.S. 298. Petitioners do not criticize the corectness of the rule stated

in the opinion (R. 320 to 332) but contend it is unduly limited and without correct application to the facts involved. We suggest that a search and seizure must be condemned also where State and Federal officers adopt a common practice that the latter may adopt and prosecute in Federal Courts offenses which the former discover in the course of their operations and a prosecution originated by the unlawful search and seizure by State officers is adopted by Federal officers and made the basis of a Federal prosecution. **Fowler vs. United States,** (7th Cir.) 62 F. 2nd 656; **Sutherland vs. United States,** (4th Cir.) 92 Fed. 2d 305; **Lowrey vs. United States,** (8th Cir.) 128 Fed. 2nd 477.

Moreover, we contend the rule to be that where State officers obtain evidence through means of an unlawful search and seizure not made under any pretense of enforcing State law, but solely in behalf of the United States for the intended purpose of prosecution in Federal courts, it is open to suppression by appropriate proceeding timely taken. **Gambino vs. United States,** 275 U. S. 310; **Aldridge vs. United States,** (10th Cir.) 67 Fed. 2nd 956; **United States vs. Butler,** (10th Cir.) 156 Fed. 2nd 897 (decided July 30, 1946).

The factual situation in Butler's case is more nearly analogous to the instant case than to any other we have found. In it the evidence was suppressed. The trial court there found that the State officers were acting solely for the purpose of aiding in the enforcement of Federal law. In the instant record on appeal the trial court was silent on that matter, although the O.P.A. regulations extended, or attempted to extend, the same power and authority to State officers that it did to Federal officers in the enforcement of the regulations relied on for prosecution here. Had the search and seizure been made by Federal officers it would, under the circumstances existing, have been unreasonable because made without any probable cause to support it. **Byers vs. U. S.,** 273 U.S. 28. We suggest the same rule as to the admissibility of

evidence obtained in the course of the search by State officers should be applied as if made by Federal officers themselves or under their direction. **Gambino vs. U. S.,** 275 U. S. 310. This is especially true where the Government uses the evidence so seized in a Federal prosecution without assuming the burden of proving that the Federal officers did not act in concert with police officers or that they had no knowledge of such a search and seizure until it had been made. **U. S. vs. Duiguid,** (2nd Cir.) 146 Fed. 2nd 848. Otherwise the force and effect of the Fourth Amendment as a fundamental guarantee against unreasonable searches is circumvented and lost. This court has said the amendment is to be construed liberally to safeguard the right of privacy **(Byers vs. U. S.,** Supra) and its protection extends to offenders as well as to the law abiding. **(Weeks vs. U. S.,** 232 U.S. 383; **Angello vs. United States.** 269 U.S. 20 at 32; **United States vs. Lefkowitz,** 285 U.S. 452). It applies to all persons regardless of citizenship **(U. S. vs. Wong** 94 Fed. 832) and commands a strict construction in favor of the individual. **(Gouled vs. United States,** Supra; **Carroll vs. United States,** 267 U.S. 132). Not only does the Fourth Amendment forbid unreasonable searches and seizure, but it prevents the use of evidence procured thereby in a criminal prosecution. **(Olmsted vs.** U. S., 277 U.S. 438). The attendant facts here reasonably suggest attempted circumvention of the Fourth Amendment. To suggest that it could be made the basis of prosecution under any statute of Iowa is absurd. **(Hall vs. United States,** (9th Cir.) 41 Fed. 2d 54; **Fowler vs. United States,** Supra; **Gambino vs. U. S.,** Supra; **Lowrey vs. United States,** Supra; **Sutherland vs. U. S.,** Supra; **United States vs. Butler,** Supra). In each and all of which the rule herein contended for was applied.

The understanding and practice between the police and Federal authorities tends strongly to indicate a delegation to the police of Federal authority for making the very seizures which the O.P.A. officers stood ready to take over and

prosecute as their own. **(Fowler vs. United States,** Supra.) This delegation to the police in the instant case came from the regulations of O.P.A. itself. (Regulations, Supra.) Moreover, after knowledge of the illegality they ratified it by accepting and taking over the prosecution in the United States District Court.

General exploratory searches such as the one in question are forbidden under both the Constitution of the State of Iowa (Section 8 of Article I) and the Constitution of the United States (4th and 5th Amendments) and if at the time of arrest no crime is being committed in the presence of arresting officers, a search of the premises or property is made solely for the purpose of discovering evidence on which to base Federal prosecution, the search and seizure violates the rights of the citizen under the 4th and 5th Amendments and to Sections 8 and 9 of Article I of the Iowa Constitution. (**Go-Bart Importing Company** vs. U. S., 282 U.S. 344; **U. S. vs. Lefkowitz,** 285 U.S. 452.

This court has been ever zealous in upholding the 4th and 5th Amendments as a necessary bulwark to the citizen's personal liberty and in the Gouled case, Supra, spoke in no uncertain tone about it. The search and seizure being illegal, the failure to return the property or impound it and its admission in evidence to secure conviction constitute prejudicial error.

II.

It was prejudicial error for the court to overrule petitioners' Motions for Instructed Verdict made at the close of the Government's evidence and thereafter renewed at the close of all the evidence, because:

(a) The material allegations of the indictment were not sustained by legal proof.

(b) The ration orders in question are so vague, indefinite and uncertain that they failed to furnish ascertainable standards of guilt and hence are void and unconstitu-

tional, thereby depriving the petitioners of due process of law in violation and contravention of the rights provided and guaranteed to them under Section 1 of the Fourteenth Amendment and further vague, indefinite, uncertain and void because they do not set forth all of the elements necessary to constitute the offense.

(c) The indictment, and each and every count thereof, is subject to the same assault and challenge because violative of the 6th Amendment requiring that the accused shall be informed of the nature and cause of the accusation against him, the complaint being that the indictment, and each and every count, fails to meet the requirements of the 6th Amendment and contains the constitutional defect and omission aforesaid which prejudicially affected their substantial rights.

(d) That the application of the ration orders in question to petitioners was violative of the due process clause and the equal protection clause of the 14th Amendment.

(e) No crime of unlawful possession or larceny could be committed for that the coupons in question were theretofore by the holders thereof given for the delivery of gasoline and endorsed by the person to whom the stamps were isued and thereafter null and void and could not be a basis for a violation of either the ration orders referred to or larceny of them as being and constituting Government property.

(f) Because the ration coupons described and offered in evidence under Counts 8 to 10, inclusive, were not Government property within the purview of Section 99, Title 18, U. S. C. A.

(g) That the coupons described and offered in evidence were of no value and not the subject of larceny.

(h) That the application of Section 99, Title 18 to the facts as described by the record was an unlawful application thereof and violative of the rights guaranteed to the petitioners under the 14th Amendment.

The first seven counts of the indictment were almost

uniform. Each of them charged these petitioners illegally had in their possession a certain number of gasoline ration coupons in violation of Revised Ration Order 5-c and General Ration Order No. 8, acquiring those coupons by stealing the same from different individuals in Wisconsin, Minnesota and Iowa. In Counts 8, 9 and 10 they were charged with the larceny of said gasoline ration coupons as being the property of the United States, although alleging that at the time of the larceny the stamps were in the temporary lawful possession of certain individuals. Petitioners contend that there was no crime of unlawful possession for the reason the coupons in question, before being acquired by them, had been given, transferred and endorsed by the holders of said stamps for the delivery of gasoline and were not useable, transferable or assignable by petitioners after acquisition of the same and, therefore, not in such possession as was denounced by the ration orders in question.

As to Counts 8, 9 and 10, they contended that the Government failed to prove that the gasoline coupons in the form existing at the time acquired by them constituted property of any kind, or were property of the United States, or were taken in violation of any statute, or acquired without the consent of the United States, or that there was any evidence showing they were lawfully acquired by the persons from whom they were taken as charged in Counts 8, 9 and 10, or that the regulations invoked were valid or constitutional. That the regulation invoked and each Count of the indictment were so vague, indefinite and uncertain that they failed to furnish ascertainable standards of guilt rendering them void, unenforcible and unconstitutional, and that the ration orders in question, being of a temporary nature and during an emergency period only, had been rescinded prior to the time of trial and the Government was without jurisdiction to apply any criminal penalties to their conduct as established in the record.

It may seem a broad statement to make, but one justified and sustained by the record, that no proof was offered or introduced that the stamps involved and claimed to have been illegally possessed and stolen were ever Government property, or especially at any time within the purview of the statutes, regulations or trial. Certainly there was no evidence upon which the convictions could be sustained that they were taken from the Government without its consent. On the other hand, if the Government did no more than prove that the stamps were the property of individual owners, then whether they were taken with or without consent was immaterial under the Federal statute invoked.

Stated another way, from the standpoint of the larceny charge in Counts 8, 9 and 10 there was no evidence from any one or any source that O.P.A. or any Ration Board or other Federal Agency that the stamps claimed to have been taken from Rosel in Count 8, or Rosenberg in Count 9, or Crispin in Count 10 were ever issued by any officer or agency of the United States, or any evidence introduced by any persons who originally owned the ration stamps in question showing how, when or where they obtained them, or from whom, or any evidence that they were or ever had been the property of the United States.

That the indictment, and each of the counts therein, insofar as they were predicated upon violation of Revised Ration Order 5-c and General Ration Order 8 were indefinite, uncertain, insufficient and void. (**Sutton vs. U. S.**, (5th Cir.) 157 Fed. 2d 661; **Keck vs. United States**, 172 U. S. 434; **United States vs. Cruikshank**, 92 U. S. 542).

On the question of ownership of the coupons in question, there had to be both allegation and proof that they were the property of the United States. (**Norton vs. Zerbst**, (10th Cir.) 83 Fed. 2nd 677; 32 Am. Jur. 1024, Section 113, Sec. 122; **Thompson vs. United States**, 256 Fed. 616; **Donnegan vs. U. S.**,

237 Fed. 641 (2nd Cir.); **Clark's Case,** (6th Cir.) 268 Fed. 329).

The Eighth Circuit in **Ripper vs. United States,** 179 Fed. 497, recognized that reversal should follow where the evidence was insufficient or essential elements not proven although no appropriate objection had been made.

One further observation as to these used, cancelled and disfigured ration coupons. It was held in **United States vs. Simmons, 148 Fed. 2d 177,** in a prosecution for a conspiracy to violate Ration Order 5-c that used stamps of the character herein involved were to be deposited in banks and destroyed and quoting from **United States vs. Sirpico,** 148 Fed. 2nd 95, the following:

> "The requirement of Ration Order No. 5-c Section 1394.8004 for endorsement on the coupons of the license number and state of registration of the vehicle for which the ration is used is for the purposes of identification and **cancellation of coupons,** not for their original validation."

We, therefore, submit and suggest that it was an improper application of the Ration Orders and Section 99 of Title 18 to the so-called property of the United States as disclosed by the record in this case.

The only O.P.A. or Rationing Board official or witness called to testify upon the matter testified as follows (R. 100): "Q. Normally when coupons are issued by your board are they finally returned to your Board? A. No, sir."

III.

Our final and equally serious proposition is based upon affirmance by the Eighth Circuit of prejudicial error created by the giving of Instruction 7 and Instructions 14 to 19, inclusive. Instruction No. 7, as an abstract proposition, may not have been prejudicial to the rights of these petitioners, but it definitely became so in connection with Instructions 14 to 19, inclusive. After stating in Instruction No. 7 that

gasoline ration coupons were the personal property of the United States, the court relieved the jury of any requirement to find in Instructions 14 to 19, inclusive, that the gasoline ration coupons involved were the property of the United States. That was a definite, vital and material element of the crime. It is so created by statute, it was so recognized in the indictment, and it was so recognized by the Court in Instruction No. 1, but in Instructions 14 to 19 given by the Court, the jury were permitted to determine the guilt of these petitioners of the theft of government property, without any finding that government property was involved at all, at least insofar as the particular gasoline ration coupons referred to in the indictment were involved.

It seems clear that it was the duty of the Government to prove that the stamps in question were Government property and that they were ration stamps theretofore legally issued by the United States. The opinion of the 8th Circuit Court, Division 13, Page 629, avoids the issue in the following language:

> "There was evidence, however, from which the jury might reasonably conclude that the coupons were lawfully issued and were taken from lawful possessors."

And again:

> "and there was no suggestion that the coupons were not genuine."

The simple answer is that the burden was at all times on the Government to prove that they were genuine and Government property and not on the petitioners to prove that they were counterfeit or the property of someone else.

And again quoting from the opinion on Page 630:

> "We have held that it was unnecessary to prove the facts surrounding issuance of the coupons."

We respectfully suggest the Eighth Circuit was in error in these respects because these matters all went to the sub-

stance of the whole case in view of the fact that the coupons in question were used or cancelled coupons and did not come within or under any rule or regulation concerning the right to have original gasoline stamps or coupons in possession.

Concerning Instruction No. 7 which informed the jury that during May 1945 gasoline ration coupons were the personal property of the United States Government, the Eighth Circuit said:

> "The instruction did not invade the province of the jury for it did not state that the particular coupons stolen were the property of the Government, though it is difficult to perceive any basis for a finding that they were not"

This does not answer the question raised that when Instruction No. 7 is considered in connection with Instructions 14 to 19, inclusive, the jury were not required to find that the coupons described in the indictment were, or ever had been, the property of the United States. It is intimated in the opinion, Divisions 15 and 16, Page 630, that because no exceptions were taken to Instructions 14 to 19, inclusive, that petitioners may not challenge them, unless there was error resulting in a miscarriage of justice, and attempts to justify the giving of those instructions by saying:

> "As all valid gasoline ration coupons were government property as a matter of law, and the jury were so instructed, and there was no issue concerning genuineness of the coupons involved, the trial court did not commit **prejudicial error** in failing in this instruction to inform the jury specifically that in order to convict defendants the jury must find that the stolen coupons were government property." (Boldface ours.)

The fundamental question overlooked by the Eighth Circuit Court is that petitioners were not concerned in their trial with whether or not the ration coupons were government property "as a matter of law", but whether they were government property "as a matter of fact", and that question

was never submitted to the jury, and the further suggestion of a pretended issue concerning the genuineness of the coupons merely befogs the issue involved.

The opinion of the Eighth Circuit Court does not say that error was not committed in the giving of Instructions 14 to 19, but says that in their opinion it did not constitute "prejudicial error". Certainly the errors created by Instructions 14 to 19 were more prejudicial than the errors discussed in **Bollenbach vs. United States,** 90 L. Ed. 318, decided January 28, 1946, wherein this court appropriately said:

> "In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of Appellate Judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be."

If the instructions given were fundamentally erroneous, substantial justice was denied and petitioners are entitled to relief under the following cases, whether exceptions were seasonably taken or not: **Bihn vs. United States,** 90 L. Ed. 1208; **Krause & Brothers vs. United States,** 90 U. S. L. Ed. 653; **Williams vs. United States,** 76 U. S. App. 299, 131 Fed. 2nd 21; **Benton vs. United States,** (4th Cir.) 80 Fed. 2nd 462; **United States vs. Max,** (3rd Cir.) 156 F. 2d 13; **Booth vs. United States,** (9th Cir.) 154 F. 2d 73; **United States vs. Levy,** (3rd Cir.) 153 Fed. 2nd 995; **Wiborg vs. United States,** 163 U.S. 632; **Clyatt vs. United States,** 197 U.S. 207; Holmes and Brandeis in **Whitney vs. California,** 274 U.S. 357; **United States vs. Ausmier,** (2nd Cir.) 152 Fed. 2d 349; **Smith vs. United States,** 157 Fed. 2d 176; **Kenion vs. Gill,** (2nd Cir.) 155 Fed. 2nd 176 at 179.

CONCLUSION.

The decisions of this court determine the issuance of the writ in favor of petitioners because both under the Con-

stitution and Statutes of the State of Iowa and of the United States, particularly the 6th and 14th Amendments, the rights of petitioners were violated and denied by both the United States District Court for the Northern District of Iowa and the United States Circuit Court of Appeals for the Eighth Circuit, and if the orders of said courts are permited to stand, they will be unjustly and illegally deprived of their liberty without legal cause or right. Petitioners have exhausted all remedies available to them for the redress of their wrongs and are without other remedy than review by certiorari from this court.

It is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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